Supreme Court, U.S.
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Nos. 92-264 and 92-280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARCADIA, OHIO, *et al.*,
Petitioners,
v.
OHIO POWER COMPANY, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
OHIO POWER COMPANY, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT OHIO POWER COMPANY IN OPPOSITION

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STATEMENT AS TO AFFILIATED COMPANIES

Pursuant to Sup. Ct. R. 28.1, Respondent Ohio Power Company presents the following list of publicly-owned parent, subsidiary and affiliated companies:

American Electric Power Company, Inc.
Appalachian Power Company
Cardinal Operating Company
Columbus Southern Power Company
Indiana Michigan Power Company
Integrated Communications Systems, Inc.
Kentucky Power Company
Ohio Valley Electric Corporation

TABLE OF CONTENTS

	Page
STATEMENT AS TO AFFILIATED COMPANIES	i
TABLE OF AUTHORITIES	iv
STATEMENT	2
REASONS FOR DENYING THE PETITIONS	11
CONCLUSION	24
APPENDIX	1a

TABLE OF AUTHORITIES

COURT CASES	Page
Arcadia, Ohio v. Ohio Power Co., 111 S. Ct. 415 (1990)	*passim*
Barnhill v. Johnson, 112 S. Ct. 1386 (1992)	16
Belcher v. Stengel, 429 U.S. 118 (1976)	13
Board of Governors of Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986)	24
Bowers v. United States, 226 F.2d 424 (5th Cir. 1955)	15
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)	14
California v. FERC, 495 U.S. 490 (1990)	20
City of Canton, Ohio v. Harris, 489 U.S. 378 (1989)	19
EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986)	19
Forrester v. Jerman, 90 F.2d 412 (D.C. Cir. 1937)	15
H.P. Coffee Co. v. Reconstruction Finance Corp., 215 F.2d 818 (Emer. Ct. App. 1954)	15
Hardy v. Lomenzo, 349 F. Supp. 617 (S.D.N.Y. 1972)	15
Lavine v. Milne, 424 U.S. 577 (1976)	15
Miller v. Commonwealth, 2 S.E.2d 343 (Va. 1939)	15
Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988)	7, 19
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986)	*passim*
Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989)	14, 16
Public Service Co. of New Mexico v. FERC, 628 F.2d 1267 (10th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)	13
Public Utility Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927)	22
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	20
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	13

TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE AGENCY DECISIONS	Page
Ohio Power Co., HCAR No. 17383 (Dec. 2, 1971)	5
Ohio Power Co., HCAR No. 20515, 14 SEC Docket 928 (1978)	5
Ohio Power Co., 25 FERC Rep. (CCH) ¶ 63,060 (1983)	6, 23
Ohio Power Co., HCAR No. 35-24286 (Dec. 29, 1986)	5
Southern Ohio Coal Co., HCAR No. 21008, 17 SEC Docket 310 (1979)	5
Southern Ohio Coal Co., HCAR No. 21537, 19 SEC Docket 1309 (1980)	5
STATUTES	
Federal Power Act of 1935, 16 U.S.C. §§ 824 *et seq.*	3
Section 205, 16 U.S.C. § 824d	3
Section 205(a), 16 U.S.C. § 824d(a)	3
Section 206, 16 U.S.C. § 824e	3
Section 318, 16 U.S.C. § 825q	6-9, 21
Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.*	2
Section 9, 15 U.S.C. § 79i	2, 5
Section 9(a)(1), 15 U.S.C. § 79i(a)(1)	4
Section 10, 15 U.S.C. § 79j	4, 5
Section 11, 15 U.S.C. § 79k(b)(1)	4
Section 13(b), 15 U.S.C. § 79m(b)	*passim*
Section 18(b), 15 U.S.C. § 79r(b)	24
Section 21, 15 U.S.C. § 79u	21
REGULATIONS	
17 C.F.R. § 250.90 (1992)	4
17 C.F.R. § 250.91 (1992)	4
17 C.F.R. § 250.92 (1992)	4
18 C.F.R. § 35.14(a)(7) (1992)	8, 9, 12-15
38 Fed. Reg. 17,253 (1973)	14
39 Fed. Reg. 28,911 (1974)	14

TABLE OF AUTHORITIES—Continued

Page

44 Fed. Reg. 28,683 (1979) 14
50 Fed. Reg. 24,779 (1985) 14

LEGISLATIVE MATERIALS

Federal Trade Commission, Utility Corporations, S. Doc. No. 92 Parts 72-A & 73-A, 70th Cong. 1st Sess. (1935) 3
Report of National Power Policy Committee on Public Utility Holding Companies, S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 4

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BRIEF OF RESPONDENT OHIO POWER COMPANY IN OPPOSITION

Respondent Ohio Power Company respectfully submits this brief in opposition to the petitions of Arcadia, Ohio, *et al.* (the Municipalities), and the Federal Energy Regulatory Commission (FERC) for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT

Ohio Power Company (Ohio Power) is a wholly-owned subsidiary of American Electric Power Company, Inc. (AEP), a utility holding company registered under the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. §§ 79 *et seq.* In the early 1970s, in order to ensure a reliable supply of environmentally compatible coal for the generation of electricity in the face of concerns about the security of contracted coal supplies, AEP launched a program to increase the portion of its coal supplies provided by affiliated mining companies. As part of this program, Ohio Power capitalized its subsidiary, Southern Ohio Coal Company (Southern Ohio), to develop and operate coal mines. The transaction required and received the approval of the Securities and Exchange Commission (SEC) under section 9 of the PUHCA, 15 U.S.C. § 79i. Ohio Power's contract to buy coal from Southern Ohio was subject to section 13(b) of the PUHCA, which requires that the sale be made upon the terms and conditions prescribed by the SEC "to insure that such contracts are performed economically and efficiently . . . at cost," 15 U.S.C. § 79m(b), and to the SEC's orders, which specify a cost-based price.

This case results from the refusal of the FERC to permit Ohio Power to recover in its wholesale rates the amounts it is obliged by SEC order to pay to Southern Ohio for coal burned in Ohio Power's generating stations to the extent those amounts exceed a hypothetical "market price." On remand from this Court, the court of appeals held unanimously that FERC's substitution of a market price standard for the "at cost" prescription specified by the SEC pursuant to the PUHCA violates the FERC's own regulation and impermissibly "traps" costs regulated by the SEC.

This case does not present an issue worthy of further review. The court of appeals' reading of a portion of an eighteen-year old regulation that has never before been

the subject of appellate litigation, and which the agency can amend prospectively, has no broad importance. Similarly, the court's conclusion that the FERC impermissibly trapped costs that the SEC had authorized Ohio Power to incur turned on the meaning of four SEC orders, which, as the Solicitor General advised this Court when the case was last before it, "relate to a particular coal mining operation of no general legal significance." No. 89-1283, Gov't Br. at 36. Even if the court of appeals' analysis of the "cost-trapping" issue were incorrect (which, as we will show, it was not), that issue is better reviewed in a case in which the FERC's regulation does not provide an independent basis for vacating the FERC's decision and in which the SEC's pricing prescription is not set forth in orders specific to the transaction.

1. As a public utility that is part of a registered holding company system, Ohio Power is subject to regulation both by the FERC and by the SEC. Its sales of electricity at wholesale are subject to the rate jurisdiction of the FERC under the Federal Power Act (FPA), 16 U.S.C. §§ 824 *et seq.* The FPA declares that all rates for the sale of electricity subject to the FERC's jurisdiction "shall be just and reasonable," 16 U.S.C. § 824d(a), and establishes mechanisms for the FERC to review rates for compliance with this mandate. See 16 U.S.C. §§ 824d, 824e.

Ohio Power's relationships with its affiliates are subject to the jurisdiction of the SEC under the PUHCA. The PUHCA was enacted as a comprehensive legislative response to the dominance of utility holding companies in the early part of this century. One of the principal concerns addressed by the legislation was the sale of goods and services by holding company subsidiaries to affiliated utility operating companies at inflated prices, which were then reflected in artificially high rates to consumers.[1]

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[1] *See* Federal Trade Commission, *Utility Corporations*, S. Doc. No. 92, Part 72-A at 467, Part 73-A at 63-64, 70, 70th Cong., 1st Sess.

Congress addressed this particular concern in two ways in the PUHCA. First, the SEC was assigned the task of determining whether a registered holding company could engage in non-utility businesses. Section 9(a)(1) of the PUHCA makes it unlawful for a registered holding company or any of its subsidiaries to "acquire, directly or indirectly, . . . any other interest in any business" without the approval of the SEC. 15 U.S.C. § 79i(a)(1). Under section 10 of the PUHCA, 15 U.S.C. § 79j, an application for such approval may be granted only if the SEC determines that it is not "detrimental to . . . the interest of investors or consumers" or "detrimental to the carrying out of the provisions of section [11 of the PUHCA]." [2]

Second, in cases in which the approval required by section 9(a)(1) has been granted, section 13(b) of the PUHCA prohibits sales transactions between affiliates within a registered holding company system except under such "terms and conditions" as the SEC "by rules and regulations or order shall prescribe . . . for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of [the purchasing companies] at cost." 15 U.S.C. § 79m(b).[3]

These provisions governed Ohio Power's purchase of coal from Southern Ohio. In 1971, Ohio Power sought

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(1935); Report of National Power Policy Committee on Public Utility Holding Companies, S. Rep. No. 621, 74th Cong., 1st Sess., 56 app. (1935).

[2] Section 11 of the PUHCA limits each registered holding company to the operation of a single integrated utility system and "such other businesses as are reasonably incidental, or economically necessary or appropriate to" its utility operation. 15 U.S.C.§ 79k(b)(1).

[3] The SEC has implemented the "at cost" standard of section 13(b) in its Rules 90 and 91, 17 C.F.R. §§ 250.90, 250.91 (1992). In Rule 92, the SEC has provided an alternative market-based standard for "goods produced by the seller." 17 C.F.R. § 250.92 (1992).

and obtained the approval of the SEC, under, *inter alia*, sections 9 and 10 of the PUHCA, to capitalize Southern Ohio to develop and operate coal mines. In granting the application, the SEC specified that, "[t]he charges for coal by Southern Ohio will be based on an amount equal to the actual cost of Southern Ohio in developing the reserve and mining such coal." *Ohio Power Co.*, Holding Company Act Release No. 17383 at 2 (Dec. 2, 1971). The SEC also stated that coal mined by Southern Ohio would be sold only to "public utility companies in the AEP system." *Id.* The transaction remained subject to the SEC's jurisdiction and in a series of subsequent orders, the SEC reiterated that "[t]he price at which [Southern Ohio] coal is sold to AEP system companies will not exceed the cost thereof to the seller." The calculation of the "cost . . . to the seller" was specified in some detail. The SEC also required Ohio Power and Southern Ohio to file quarterly reports detailing the quantity and price of coal sold.[4] The SEC has noted that a principal purpose of its continuing oversight is to protect consumers, explaining, in the course of approving a new financing arrangement for Southern Ohio, that a reduction in Southern Ohio's financing costs "represent[s] a reduction in the cost of coal billed to Ohio Power by [Southern Ohio] and therefore a reduction in the cost of electricity to consumers." *Ohio Power Co.*, Holding Company Act Release No. 35-24286 at 3 (Dec. 29, 1986).

2. In 1982, Ohio Power filed with the FERC to change its wholesale rates. All issues were settled except the extent to which Ohio Power could recover through its wholesale rates its costs for coal purchased from Southern Ohio.

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[4] *Ohio Power Co.*, Holding Company Act Release No. 20515, 14 SEC Docket 928, 929-30 (1978). *See also Southern Ohio Coal Co.*, Holding Company Act Release No. 21008, 17 SEC Docket 310 (1979); *Southern Ohio Coal Co.*, Holding Company Act Release No. 21537, 19 SEC Docket 1309 (1980).

The FERC's Administrative Law Judge found that, by solving operating problems previously experienced at an Ohio Power generating unit, the use of Southern Ohio coal had produced savings for electric customers, which justified paying significantly higher prices for the Southern Ohio coal. *Ohio Power Co.*, 25 FERC Rep. (CCH) ¶ 63,060 at 65,194 (1983). The Judge concluded that Ohio Power had been prudent in acquiring rights to Southern Ohio coal, that the mine had been "efficiently developed and operated," *id.* at 65,201, and that the inclusion of the price paid for the Southern Ohio coal in Ohio Power's wholesale rates was reasonable. *Id.*

Although it accepted the Judge's findings as to the prudence of Ohio Power's using Southern Ohio coal and the efficient operation of the mine, the FERC nevertheless reversed. The FERC limited Ohio Power's recovery in wholesale rates for the cost of Southern Ohio coal to a hypothetical market price, "regardless of whether the [market] price is higher or lower than costs." Pet. App. 77a.[5] *See also* Pet. App. 78a, 81a. The FERC rejected Ohio Power's contention that the agency was required, either under its own rules or under section 318 of the FPA, 16 U.S.C. § 825q,[6] to give conclusive effect to the SEC's application of a cost-based method of pricing the Southern Ohio coal. The FERC found section 318 inapplicable for two reasons. First, it concluded that its determination of the amount to be recovered in Ohio Power's wholesale rates for the Southern Ohio coal was a different "subject matter" than the SEC's specification of the price at which the coal could be sold to Ohio Power. Pet. App. 52a. Second, it concluded that its limitation of Ohio Power's recovery for that coal did not

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[5] Citations to "Pet. App." are to the appendices to the FERC's Petition.

[6] Section 318 provides that whenever a person is subject to requirements imposed under both the PUHCA and the FPA with respect to certain specified subject matters, "such person shall not be subject to the [FPA] requirement." *Id.*

conflict with the SEC's orders because those orders did not appear to the FERC "to mandate the cost-based price where a market price would be lower, rather they permit a price up to a cost-based price." Pet. App. 51a.

3. Upon Ohio Power's petition for review, the U.S. Court of Appeals for the District of Columbia Circuit unanimously vacated the decision of the FERC. In an opinion written by Judge Sentelle and joined in by Judge Silberman, the court held that the SEC and the FERC were regulating the same subject matter and, therefore, under section 318 of the FPA, the FERC could not deny Ohio Power recovery of the price paid to Southern Ohio for coal. 16 U.S.C. § 825q. *See* Pet. App. 25a. The court rejected the FERC's argument that section 318 applied only in the case of an actual conflict between the requirements imposed by the FERC and the SEC, Pet. App. 30a, though it also found such a conflict inevitable whenever the market price allowed by the FERC exceeded the cost-based price mandated by the SEC, Pet. App. 34a. The court also held that its decision, while resting on its interpretation of the statute, was "buttressed by the consistency of its consequences with Supreme Court precedents that disfavor conflicting regulation resulting in trapped costs." Pet. App. 31a. By virtue of the statutory allocation of jurisdiction embodied in section 318, the court found the present case indistinguishable from *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). Pet. App. 33a.

The third member of the panel, Judge Mikva, agreed with the FERC that section 318 applied only in the case of actual conflict. Pet. App. 35a. He found no such conflict because he read the SEC's orders to establish "cost [only] as a ceiling," Pet. App. 38a, though he stated that he, too, would find a conflict if the market price exceeded cost. Pet. App. 39a. Although he disagreed with the ma-

jority with respect to section 318, he concurred in the judgment because of his conclusion that the FERC had violated its own regulation, 18 C.F.R. § 35.14(a)(7) (1992), under which the cost of fuel purchased from a utility's affiliate, "the price of which is subject to the jurisdiction of a regulatory body, . . . shall be deemed to be reasonable." *See* Pet. App. 39a-43a. The FERC's interpretation of this regulation as creating only a rebuttable presumption of reasonableness was, he held, entitled to no deference because it was "at odds with the plain meaning of the text." Pet. App. 40a. He also found the FERC's interpretation inconsistent with the structure and history of the regulation. Pet. App. 41a-43a.

4. The Municipalities sought review in this Court. They argued that section 318 applies only in the case of an actual conflict between the obligations imposed on a regulated entity by the FERC and the SEC, and that no such conflict exists in the present case. No. 89-1283, Pet. Br. at 13-16. In a joint submission on behalf of the FERC and the SEC, the Solicitor General also argued that section 318 applies only where the requirements of the two agencies create conflicting obligations for regulated entities. No. 89-1283, Gov't Br. at 12. The agencies urged a remand to the court of appeals to undertake the "conflicts" inquiry that they deemed required under section 318, which inquiry, they stated: "depends on the meaning of four SEC orders that have never been construed by any court and that relate to a particular coal mining operation of no general significance." *Id.* at 36.

This Court reversed the court of appeals, although it did not accept the arguments posed by Petitioners. Instead, the Court concluded that section 318 governed only four areas of potential overlap between the FPA and the PUHCA, none of which was implicated in this case. *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 419-22 (1990). The Court explained that the only arguably pertinent portion of section 318, that covering "the acquisi-

tion or disposition of any security, capital assets, facilities, or any other subject matter," 16 U.S.C. § 825q, was inapplicable because, while the SEC was regulating Ohio Power's "acquisition" of Southern Ohio or of Southern Ohio coal, the FERC was not regulating the acquisition of either such subject matter. 111 S. Ct. at 422 and n.3.

Recognizing that its "conclusion that § 318 has no application to this case [did] not end review of the FERC order," *id.*, the Court remanded to the court of appeals for consideration of arguments that the Court did not reach. First, it pointed to the ground relied upon by Judge Mikva: "the argument that FERC's decision violates its own regulation, . . . 18 C.F.R. § 35.14(a)(7)." *Id.* Second, it noted the continued availability of "the argument that the FERC-prescribed rate is not 'just and reasonable' because it 'traps' costs which the government itself has approved—disregarding a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating [Southern Ohio]. Cf. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986)." *Id.*

5. On remand, in a decision written by Judge Sentelle, the court of appeals again unanimously vacated the FERC's orders. First, the court held that the FERC's refusal to accept the cost-based pricing for Southern Ohio coal mandated by the SEC violated the plain language of the FERC's regulation. Pet. App. 7a-9a. It recognized that an agency's interpretation of its own regulations is not entitled to the usual deference "[w]hen an agency's interpretation flies in the face of the language of the rules themselves." Pet. App. 8a. The court unanimously agreed with Judge Mikva's earlier conclusion that the "unambiguous" meaning of "deemed to be reasonable" in the FERC's regulation "requires FERC to include in Ohio Power's wholesale rate the SEC-approved cost-based price for [Southern Ohio] coal," and would not support the rebuttable presumption reading urged by the FERC.

Pet. App. 8a-9a. The court also found that FERC's proposed reading was undercut by the history of the regulation. Pet. App. 9a.

Second, as an independent basis for its decision, the court held that "FERC may not set a cost-trapping rate level where that effect is occasioned by a recovery calculation inconsistent with an SEC determination governing an interassociate transfer subject to § 13(b) of the PUHCA." Pet. App. 14a. The FERC argued that the cost-trapping resulting from the combination of its order and the SEC's orders was permissible because the same subject matter was not before the two agencies and because there was no conflict between the two agencies' requirements inasmuch as the SEC's orders established cost only as a ceiling. FERC C.A.Br. at 20. The court of appeals rejected these arguments. Relying on this Court's reasoning in *Nantahala*, the court of appeals concluded that the fact that the cost-trapping resulted from the FERC's regulation of Ohio Power's wholesale electric rates, rather than from an attempt by the FERC to modify directly the price that Ohio Power paid to Southern Ohio, did not diminish or excuse the cost-trapping. Pet. App. 10a-11a. Based upon a close review of the orders of the SEC with respect to the Ohio Power-Southern Ohio transaction, the court determined that the SEC established cost as both a ceiling and a floor for Southern Ohio coal, and that the FERC's orders therefore necessarily trapped costs authorized by the SEC. Pet. App. 13a. It noted that its interpretation of the SEC's orders was echoed in an *amicus* statement submitted by the SEC. Pet. App. 13a n.3, citing SEC C.A. *Amicus* Statement at 5.[7] The court

[7] In its *Amicus* Statement (App., *infra*, 1a-5a), the SEC expressed its "disagree[ment] with the interpretation FERC places on the SEC orders in this case," and explained, "the SEC believes that the orders establish cost as both a floor and a ceiling." App., *infra*, 5a (footnote omitted). The SEC observed that unless its orders were "construed to obligate [Ohio Power] to pay a cost-based price and only a cost-based price . . . it would undermine the very reason that the SEC authorized" the transaction. App., *infra*, 4a.

held that the FERC's authority under the FPA to set "just and reasonable" rates must yield before the specific command of section 13(b) of the PUHCA that affiliate transactions within holding companies be on terms and conditions established by the SEC and the "determination" in the SEC's orders that the Southern Ohio coal must be priced "at cost." Pet. App. 14a.

REASONS FOR DENYING THE PETITIONS

Further review of the decision of the court of appeals is unwarranted. The decision below rests on two independent grounds, both of which respond directly to the questions posed on remand and involve the resolution of narrow questions that have limited application outside the facts of this case. First, the court of appeals reviewed the language of the FERC's regulation to determine if the language could bear the meaning the agency now ascribes to it. Its finding that the agency's interpretation was at odds with the plain meaning of the language led inexorably under this Court's established precedents to the conclusion that the FERC had violated its own regulation. Second, the court of appeals' independent conclusion that the FERC's orders conflicted with the regulatory prescriptions of the SEC, resulting in an impermissible trapping of costs, was based on a close analysis of the orders issued by the SEC with respect to the transaction at issue. As the Solicitor General pointed out when this matter was previously before this Court, the interpretation of those orders is without broader import. This case does not present the issue of whether the FERC may apply a market test to a transaction subject to section 13(b) in the absence of its regulation and of SEC orders specifically prescribing a cost-based price. The Court should not reach out to review an issue that may be squarely presented in another case, if the FERC decides to amend its regulation. Nor should the Court accept the FERC's entreaty to chastise the court of appeals for failing to address the cost-trapping question

through an analysis that neither Petitioner suggested to the court below.

Finally, Petitioners' claims that the decision below will open a wide "regulatory gap" are wholly unfounded. The decision does not leave the pricing of affiliate transactions within holding companies immune from *all* regulation. To the contrary, it effectuates Congress' determination that the SEC has, and must exercise, the responsibility to police such transactions to protect consumers from exploitation. The "regulatory gap" claims reflect nothing more than a distrust of the SEC's ability to fulfill the role assigned to it by Congress. If there were any basis for this distrust—and, in light of the FERC's agreement that Ohio Power was prudent in using Southern Ohio coal and that the mine was efficiently run, this case surely reflects none—then the proper forum for Petitioners' concerns would be the Congress, not this Court.

1. a. The first question posed by this Court on remand concerns whether the FERC's refusal to give effect to the SEC's specification of a cost standard for Southern Ohio's sale of coal to Ohio Power "violates its own regulation, which provides that where the price of fuel purchased from an affiliate 'is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable' in wholesale rates. 18 C.F.R. § 35.14 (a) (7)." 111 S. Ct. at 422. The court of appeals answered this question in the affirmative, approving Judge (now Chief Judge) Mikva's earlier analysis and holding that the FERC's interpretation of the regulation as creating only a rebuttable presumption of reasonableness is "not consistent with the unambiguous terms of the regulation." Pet. App. 9a.

Petitioners seek review of this holding, although they make no serious attempt to argue that it has any broad significance. In fact, prior to the decision in this case, the pertinent portion of section 35.14(a) (7) had not

required judicial interpretation since its promulgation in 1974.[8] Whether or not the court of appeals correctly read the language of the regulation, its holding plainly presents no issue warranting review in this Court. Moreover, as the court noted, Pet. App. 9a, the FERC is free to amend its regulation to conform with the meaning that it mistakenly thought was conveyed by the present language. Because the decision below can rest on this independent ground, the Petitions should be denied.

Petitioners contend that the case should nevertheless be reviewed because the holding below on the "cost-trapping" issue, discussed *infra*, precludes the FERC from applying its market test to transactions subject to the SEC's cost-based pricing even if the FERC amends the regulation. FERC Pet. at 14; Municipalities Pet. at 24. Petitioners have it backwards. This Court does not review lower courts' decisions on issues that are not necessary to support a judgment below merely for the convenience of the parties.[9] As long as the FERC's own regulation precludes the FERC from applying its market test to transactions like the one at issue here, the cost-trapping issue may never arise again. It is therefore incumbent on the FERC, if it wishes to bring the cost-trapping issue before the Court, to clear away the impediment posed by its own regulation to its application of a market test to transactions for which the SEC has specified a cost standard.[10]

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[8] In *Public Service Co. of New Mexico v. FERC*, 628 F.2d 1267 (10th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981), the court addressed the application of the fourth sentence of section 35.14(a)(7) (concerning the filing of unregulated affiliate fuel contracts), which is not at issue here.

[9] *See Belcher v. Stengel*, 429 U.S. 118 (1976) (petition dismissed where issue presented is not determinative); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (The Court "decides questions of public importance, . . . [but only] in the context of meaningful litigation.").

[10] It is by no means a foregone conclusion that the FERC would in fact amend its regulation. Indeed, the FERC and its predecessor

b. Moreover, the holding below is correct on the merits. The court of appeals applied the precise framework laid down by this Court for the review of an agency's interpretation of its own regulations. The court noted that an agency's interpretation is not entitled to the usual deference when it is "at odds with the plain meaning of the text." [11] It rejected the FERC's interpretation precisely because the plain meaning of the language employed in the regulation could not support the meaning that the agency now would give it.

Petitioners' primary attack on the holding below is their assertion that, because the court of appeals stated that "courts construing the word 'deemed' have *generally* found that it establishes a conclusive presumption" (Pet. App. 8a, quoting Pet. App. 40a, emphasis added), the existence of a few contrary authorities establishes sufficient ambiguity to require judicial deference to the agency's interpretation. FERC Pet. at 23; Municipalities Pet. at 21.[12] This argument is flawed in at least two critical respects.

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have twice backed away from issuing a regulation that would have accomplished the result the agency now seeks to achieve by interpretation. *See* 50 Fed. Reg. 24,779 (1985); 44 Fed. Reg. 28,683 (1979); 39 Fed. Reg. 28,911 (1974); 38 Fed. Reg. 17,253 (1973). The court below found that this history undercut the FERC's "rebuttable presumption" interpretation of the regulation. Pet. App. 9a, 41a-42a. After considering comments in a rulemaking proceeding, the agency may again decide to leave the current regulation in place, or to modify it in a way that presents entirely different issues.

[11] Pet. App. 8a, quoting Pet. App. 40a. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (agency interpretation given deference unless "plainly erroneous or inconsistent with the regulation"). Cf. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989) ("[O]f course, no deference is due to agency interpretations at odds with the plain language of the statute itself.").

[12] Petitioners also argue that reading "shall be deemed" in the first sentence of section 35.14(a)(7) in accordance with the usual meaning of the language employed is inconsistent with the FERC's

First, though Petitioners cite a handful of cases to support their contention that "deemed" may be read to create a rebuttable presumption, many of these citations are inapposite.[13] The weight of authority is accurately described in one of the cases cited by the court of appeals, which found an "*almost unanimous* judicial determination that the word [deemed], when employed in statutory law, creates a conclusive presumption." [14]

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implementation of its general authority over utilities' fuel costs, as set out in the balance of the regulation. FERC Pet. at 24; Municipalities Pet. at 22. This argument was succinctly addressed in Judge Mikva's original concurring opinion, where he found that the FERC's policy decision, expressed in section 35.14(a)(7), to "abide by the determination" of another agency that has passed on the price paid in an affiliate fuel transaction is "entirely consistent with the purpose of . . . avoid[ing] unreasonable fuel costs between affiliated companies, for if another agency (e.g., the SEC) has already made that determination, then there is no reason for FERC to second-guess that decision." Pet. App. 43a. The last sentence of the regulation, which states that fuel charges by affiliated companies "which do not appear to be reasonable" may be subject to suspension or investigation, is not to the contrary, since this sentence applies only to affiliate fuel purchases that are not subject to price regulation by another agency.

[13] In two of the cases cited by Municipalities, *Lavine v. Milne*, 424 U.S. 577, 583 (1976), and *Hardy v. Lomenzo*, 349 F. Supp. 617, 621 (S.D.N.Y. 1972), the statutes involved provided expressly for the admission of evidence on the point ultimately at issue. Similarly, in *Miller v. Commonwealth*, 2 S.E.2d 343, 436 (Va. 1939), the court relied on the fact that a prior version of the statute had contained the phrase "*prima facie*" before the word "deemed," and concluded that the deletion of this phrase was not intended to change the statute's meaning. Petitioner FERC also cites a dissenting opinion in a Fifth Circuit case, *Bowers v. United States*, 226 F.2d 424, 431-33 (5th Cir. 1955). Not only was this reading unpersuasive to the majority, see 226 F.2d at 429, it was based on the dissenting judge's concern (shared by the Virginia court in *Miller v. Commonwealth*) that construing the statute to create a conclusive presumption would create constitutional difficulties. *Id.* at 436. No such claim is presented here.

[14] *H.P. Coffee Co. v. Reconstruction Finance Corp.*, 215 F.2d 818, 822 (Emer. Ct. App. 1954) (emphasis added). See also *Forrester v.*

Moreover, the import of Petitioners' argument is that if an agency can point even to a single instance in which a court construed a word differently than did every other, then that word is "ambiguous" when used by the agency, rendering the agency's application of the regulation effectively immune from judicial review. Since it will be rare for any word to receive an absolutely uniform judicial interpretation, no matter the context in which it is used, this novel rule would virtually eliminate agencies' accountability in the implementation of regulations. Nothing in logic or in this Court's precedents supports such a curious result.[15]

2. a. The second issue remanded by this Court concerns whether the FERC's order impermissibly traps costs incurred in a transaction as to which the SEC had fixed the pricing standard. 111 S. Ct. at 422. Whether or not the court of appeals' affirmative answer to this question, which was based on an analysis of the orders issued by the SEC with respect to this specific transaction, was correct—and we will explain, *infra*, that it was—this issue does not merit review in this Court.

Petitioners portray the decision below as laying down a broad rule of law that the FERC is precluded from applying its market test to *any* transaction that is subject to the "at cost" requirement of section 13(b) of the PUHCA, if the effect of applying the test would be to trap costs incurred in that transaction. FERC Pet. at 21, 25; Municipalities Pet. at 12. In fact, while the court of

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Jerman, 90 F.2d 412, 413 (D.C. Cir. 1937) (the word "deemed" is "unambiguous and leaves nothing for interpretation").

[15] *See Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992) (the word "transfer" in section of Bankruptcy Code not ambiguous, even though courts of appeal had split on interpretation); *Public Employees Retirement System v. Betts*, 492 U.S. at 168 (term in a statute must be "given its ordinary meaning" by implementing agency).

appeals began its analysis with section 13(b), it did not rest on the statute, or even on the SEC's regulations implementing it. It reviewed the orders issued by the SEC with respect to this transaction to determine whether the SEC had specifically prescribed a cost-based price for Southern Ohio coal. Its finding that these orders "are better read as requiring Ohio Power to pay a price 'equal to cost' for SOCCO coal," Pet. App. 13a, is consistent with the SEC's own reading of the orders (App., *infra*, 2a, 4a), and is not challenged in either Petition.

The court of appeals' finding that the SEC orders prescribed a cost-based price was a predicate to its conclusion that the FERC's order resulted in impermissible cost-trapping.[16] This is clear from the court's ultimate holding that the FERC "may not set a cost-trapping rate level where that effect is . . . inconsistent with *an SEC determination* governing an inter-associate transfer subject to § 13(b) of the PUHCA." Pet. App. 14a (emphasis added).

The decision below thus turned on what the FERC and the SEC have jointly described as "the meaning of four SEC orders . . . that relate to a particular coal mining operation of no general legal significance." No. 89-1283, Gov't Br. at 36. Such a decision does not warrant review in this Court, especially when the lower court's interpretation of the SEC's orders agrees with that advanced by the SEC itself. This case simply does not present the broader issue as to which Petitioners seek review, *i.e.*, whether, in the *absence* of SEC orders specifically prescribing a cost-based price, the FERC may issue a rate

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[16] As discussed, *infra*, the FERC contended below that the prohibition against cost-trapping could not apply because the SEC orders established only a cost-based cap on the price of coal, precluding any conflict between the two agencies' pricing standards. Pet. App. 11a; FERC C.A. Br. at 20. The court rejected this contention because it determined that the FERC's premise was faulty.

order that has the effect of trapping costs incurred in a transaction subject to section 13(b) of the PUHCA.[17]

b. Petitioners' claim that the court of appeals' holding on the cost-trapping issue exceeded the scope of this Court's remand is based on a distorted reading of the opinions both of this Court and of the court below. Petitioners first maintain that the manner in which the Court phrased the cost-trapping issue obliged the court of appeals to weigh the extent to which the SEC's orders gave Ohio Power a "justifiable reliance interest" that it would be permitted "to recoup its investment" in Southern Ohio, and to decide whether that interest was abrogated by the FERC's orders. FERC Pet. at 15.

As an initial matter, we note that the FERC did not suggest to the court of appeals the analysis that it now asserts was mandated by this Court's remand. The teaching that the FERC urged the lower court to draw from the language of the Court's remand was that the meaning of the SEC's orders remained critical to the cost-trapping issue because, if those orders established only a ceiling price, "Ohio Power could not possibly have reasonably relied on the SEC's orders as guaranteeing recovery . . . of its cost of purchasing . . . coal from [Southern Ohio]." FERC C.A. Br. at 21. *See also id.* at 26. After the court of appeals addressed *precisely* this question, see *supra*, the FERC now argues that the lower court misinterpreted the instructions on remand. This Court should be loathe

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[17] This issue may well be presented in another case, inasmuch as section 13(b) of the PUHCA and the implementing regulations do not require the SEC to prescribe by order the specific pricing mechanism applicable to each affiliate transaction. The fact remains, however, that the SEC did so in the case of the Ohio Power-Southern Ohio transaction, in order to "exempt [Ohio Power] from the self-executing standards of the SEC rules [see n.3, *supra*] . . . and instead to establish a cost-based pricing standard" (App., *infra*, 4a) and its "determination" in this specific case was crucial to the decision below. Pet. App. 14a.

to review a court of appeals' alleged failure on remand to engage in an analysis that Petitioners did not urge on the lower court.[18]

Moreover, the FERC's attempt to convert the cost-trapping inquiry into a "takings"-style analysis is without foundation. Nothing in this Court's reference to "the argument [made by Ohio Power] that the FERC-prescribed rate . . . 'traps' costs," 111 S. Ct. at 422, suggests that the Court was doing anything more than asking the lower court to determine whether the rationale of the cost-trapping prohibition developed in *Nantahala* and *Mississippi Power & Light* applies in the circumstances of this case. In neither *Nantahala* nor *Mississippi Power & Light* did the Court consider it necessary to undertake the type of analysis now urged by the FERC, and there is no hint in this Court's remand language in *Arcadia* that the court of appeals was expected to proceed in a radically different fashion.

Petitioners also contend that the court of appeals undertook a general inquiry into whether the FERC's denial of recovery of Ohio Power's cost of purchasing coal from Southern Ohio conflicts with the SEC's regulation of this transaction. This inquiry, they claim, overstepped the bounds of the remand and revisited a question decided in the negative in this Court's earlier opinion. FERC Pet. at 21. The court of appeals, however, did not pursue conflicts in the abstract, but in the context of deter-

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[18] *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 .n.5 (1989); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Municipalities likewise did not develop before the court of appeals the argument they now make (Pet. at 17-18) that section 13(b) simply authorizes affiliate transactions that would otherwise be unlawful, but does not establish a pricing standard for those transactions. Instead, they argued that the SEC had in fact ordained a market test for sales of coal. Intervenors' C.A. Br. at 14-16. The lower court's refusal to adopt a reading of section 13(b) that was not suggested to it does not merit further review.

mining whether the FERC's orders impermissibly trapped costs that the SEC had authorized Ohio Power to incur.[19] The FERC cannot be heard to complain, having urged the court of appeals not to apply the Court's cost-trapping precedents both because different subject matters allegedly were involved and "because no conflict between the SEC's and FERC's regulatory activity has been established in this case," in that the SEC's orders set only a ceiling price for coal. FERC C.A. Br. at 20. See also Intervenors C.A. Br. at 16.

The court of appeals considered and rejected each of these arguments. It first addressed the FERC's "different subject matters" claim, finding that the FERC's regulation of Ohio Power's wholesale rates had as substantial an effect on the purchase of coal from Southern Ohio as the state's retail rate regulation had on the distinct subject matter of wholesale rates in *Nantahala*. Pet. App. 10a-11a. The court then found that the FERC's regulation had to yield so that the specific "at cost" mandate of section 13(b) and the SEC's orders applicable to this transaction would be given meaningful effect. Pet. App. 11a-13a. See n.19, *supra*. Finally, as discussed *supra*, the court found that the FERC had misinterpreted the

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[19] The cost-trapping prohibition enunciated in *Nantahala* is grounded in the recognition that a state rate order that traps costs approved by the FERC can result in "impermissible interference . . . with the scheme of federal regulation," 476 U.S. at 970, which would create a conflict insofar as the state regulation "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *California v. FERC*, 495 U.S. 490, 506 (1990), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). *See also Nantahala*, 476 U.S. at 964 (filed rate doctrine, which underlies cost-trapping prohibition, is itself based on the invalidity of state regulation that conflicts with federal authority). The court of appeals was thus entirely correct in recognizing that a cost-trapping inquiry necessarily involves a determination of whether two regulatory schemes conflict, *i.e.*, whether, by trapping costs, the FERC's orders frustrate the SEC's implementation of the regulatory regime established in the PUHCA.

SEC's orders and regulations, which prescribed cost as both a ceiling and a floor. On this basis, the court concluded that the "FERC may not set a cost-trapping rate level . . . inconsistent with an SEC determination governing an inter-associate transfer." Pet. App. 14a. This holding responds directly to the question posed on remand, as the FERC itself interpreted that question for the court of appeals.

Nor was the existence of a conflict, in the cost-trapping sense, decided by this Court in its earlier opinion. Indeed, the Court explicitly stated that it was not reaching the question of whether, "if an actual conflict is prerequisite [to the FERC yielding to the SEC], . . . it exists here." 111 S. Ct. at 418. The Court addressed a different question: whether the two agencies had imposed a requirement "with respect to . . . the acquisition or disposition of . . . any . . . subject matter." *Id.* at 422, quoting 16 U.S.C. § 825q. Its conclusion that the two affiliates were not both acquiring or disposing of the same commodity can hardly be read to have foreclosed a determination by the court of appeals that, in the circumstances of this case, a FERC order trapping costs authorized by the SEC would impermissibly frustrate the SEC's regulation of this affiliate transaction. Had the Court meant to foreclose such a finding, which the FERC conceded to be central to the cost-trapping issue, it surely would not have specifically identified this argument as available on remand.[20]

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[20] Similarly, a remand would have been pointless if there were any basis for the Municipalities' contention (Pet. at 16-17) that this Court's delineation of the scope of section 318 was equivalent to a holding that, in all matters falling outside that provision, the FERC is free to ignore conflicts with the SEC's regulatory prescriptions. This argument also ignores section 21 of the PUHCA, which provides that "nothing in [the PUHCA] shall affect . . . the jurisdiction of any other commission . . . of the United States . . . over any person, security or contract, insofar as such jurisdiction does not conflict with any provision of [the PUHCA] or any rule, regulation, or order thereunder." 15 U.S.C. § 79u.

3. Petitioners claim that the decision below, if not reviewed, will open a broad regulatory gap, leaving millions of consumers unprotected against the risk of paying inflated utility rates due to excessive payments for goods or services procured from affiliates.[21] Even if the decision below were not based on the SEC orders specific to this transaction, this claim would fail. The court of appeals' decision does not immunize the pricing of affiliate transactions within holding companies from all regulatory oversight. Rather, it permits the SEC to exercise the authority given it by Congress to determine when holding companies may enter into non-utility businesses and to regulate such transactions "as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently . . . at cost." 15 U.S.C. 79m(b). The "gap" of which Petitioners complain in fact is completely filled by the SEC.[22]

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[21] Municipalities Pet. at 11-15, 18; FERC Pet. at 18. Petitioners' claims are premised in part on their belief that the court of appeals' decision would bar state utility commissions, as well as the FERC, from trapping costs regulated by the SEC. FERC Pet. at 26. The possibility, however, that the court's reasoning could be extended to instances of cost-trapping by a state commission does not support review of the decision below. There is nothing novel about the proposition that a state utility commission may not exercise its "undoubted jurisdiction over retail sales" in a manner that interferes with a federal agency's execution of the responsibilities assigned to it by Congress. *See Nantahala*, 476 U.S. at 970. Nor is it surprising that state commissions and state consumer advocates oppose application of this settled principle. Petitioners' claims, moreover, ignore the extent to which the decision below rests on the court's interpretation of the orders issued by the SEC with respect to this particular transaction.

[22] The FERC's discussion of the "*Attleboro* gap" (Pet. at 18) therefore misses the mark. The decision in *Public Utility Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), prohibited states from regulating interstate wholesale sales of electricity when there was no federal agency empowered to do so, creating a regulatory void. Here, to the limited extent the FERC is required by the decision below to stand aside, the SEC is in a position to protect consumers.

Nor is the FERC's role completely circumscribed. The FERC retains the authority to determine how costs incurred in affiliate transactions for which the SEC has prescribed a price under its PUHCA authority are to be reflected in a utility's wholesale rates and to ensure that the utility collects no more than the SEC-authorized price. It may also advise the SEC of its views as to whether a particular affiliate transaction should go forward or whether a transaction should be exempted from the "at cost" standard of section 13(b). *See* Pet. App. 14a, n.3, *supra*. Moreover, the FERC could also urge the SEC to exercise its continuing jurisdiction over affiliate transactions in a manner consistent with the interests of investors and consumers. *See* App., *infra*, 5a n.9.

In this case, the SEC exercised the authority assigned to it by Congress by approving the initiation of Southern Ohio's coal mining activities, specifically prescribing a cost-based price, and requiring regular reporting of the quantity and price of the coal sold to Ohio Power. Nothing in the record suggests that the SEC's regulation has been ineffective. To the contrary, the FERC affirmed and adopted the findings of its Administrative Law Judge that Ohio Power acted prudently in using coal from Southern Ohio and that Southern Ohio efficiently operated the mine supplying the coal in question.[23]

Municipalities nevertheless complain that the SEC is ill-equipped to discharge the responsibility assigned to it in PUHCA. Pet. at 13. This assertion rests on an in-

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[23] 25 FERC Rep. (CCH) at 65,201; Pet. App. 80a. Accordingly, while the question of whether the FERC may deny recovery of costs that result from inefficient operation of an affiliate venture without treading upon the SEC's mandate to ensure that affiliate transactions are performed "economically and efficiently," 15 U.S.C. § 79m(b), might be of some interest, this question is simply not presented in this case. There is no basis whatsoever for Municipalities' assertion (Pet. at 12-13) that the decision below leaves no federal agency in a position to police the "gold-plating" of affiliate transactions.

complete understanding of the SEC's authority.[24] More fundamentally, however, even if Petitioners were correct that Congress gave the SEC the responsibility for policing affiliate transactions, but neglected to include all the tools necessary to do the job effectively, that is not a situation that this Court could remedy. Their petitions are more appropriately addressed to Congress. *See Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986).

CONCLUSION

This Court should deny the petitions for a writ of certiorari.

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[24] Municipalities contend, for example, that the SEC is powerless to investigate complaints regarding affiliate transactions. Pet. at 13. This ignores section 18(b) of PUHCA, which authorizes the SEC, on its own motion or at the request of a State commission, to investigate "the business . . . or practices of any registered holding company or subsidiary company thereof or facts, conditions, practices, or matters affecting the relations between any such company and any other company or companies in the same holding-company system." 15 U.S.C. § 79r(b).

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

INTRODUCTION

The Supreme Court remanded this case to this Court to decide whether the order on review, issued by the Federal Energy Regulatory Commission ("FERC"), traps costs "disregarding a governmental assurance, possibly implicit" in certain orders of the Securities and Exchange Commission ("SEC") that Ohio Power Company would be permitted to recoup the cost of acquiring and operating a captive coal operation. 111 S.Ct. at 422. The answer to that question may involve the interpretation of the SEC orders, which were issued under the Public Utility Holding Company Act of 1935. The parties have advanced differing interpretations of those orders. Accordingly, to aid this Court in construing the relevant

orders, the Securities and Exchange Commission submits this statement as amicus curiae setting forth its interpretation of its orders.[1]

DISCUSSION

In a series of four orders beginning in 1971 and ending in 1980, the SEC authorized Ohio Power Company ("OPCO") to establish and finance Southern Ohio Coal Company ("SOCCO"). In its 1971 order, the SEC stated that the price of SOCCO coal sold to affiliates would "be based on an amount equal to the actual cost of [SOCCO] in developing the reserve and mining such coal" including overheads, interest charges and a reasonable rate of return on OPO's investment in SOCCO.[2] In the later orders, the SEC stated that the price of the coal would "not exceed cost."[3]

In the SEC's view, the 1971 order on its face requires OPCO to pay cost (as defined in the order) for the SOCCO coal, not cost or market, whichever is less. Although the latter three orders are somewhat ambiguous, the SEC believes that they too should be read, in light of their context and the policies underlying the orders, to require OPCO to pay a cost-based price for the coal, no more and no less.

In the 1970's, a number of electric utilities began to rely more heavily on coal to meet their fuel needs. At the same time, however, a number of factors operated to produce unstable coal supplies and higher coal prices.

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[1] This statement addresses only the meaning of the SEC's orders and does not take a position as to what effect, if any, the SEC's interpretation should have on the resolution of the case.

[2] *Ohio Power Co.*, Holding Company Act Release ("HCAR") No. 17383 (December 2, 1971).

[3] *Southern Ohio Coal Co.*, HCAR No. 20515, 14 SEC Dkt. 928 (April 24, 1978); *Southern Ohio Coal Co.*, HCAR No. 21008, 17 SEC Dkt. 310 (April 17, 1979); *Southern Ohio Coal Co.*, HCAR No. 21537, 19 SEC Dkt. 1309 (April 25, 1980).

Although the use of long-term supply contracts with independent coal producers tended to eliminate the need to search repeatedly for new coal supplies and to negotiate prices, the use of long-term contracts also produced problems for utilities. During the tight market of 1973-74, for example, some coal operators reneged on long-term coal supply contracts, leaving utilities to seek expensive alternative sources of supply in the spot market. Against this backdrop, many utilities, including OPCO, sought to acquire coal properties as a way of preventing the recurrence of these problems. Although such captive coal operations were recognized to be potentially costly and to pose high risks, such operations were thought to offer several advantages, including increased security of supply, protection against non-cost-related coal price increases, tax shelters for income earned from power generation, and leverage in negotiations with independent coal producers.

In permitting OPCO to undertake its captive coal operation, the SEC recognized, consistent with its statutory mandate, that such an operation was reasonably incidental, or economically necessary or appropriate to the operations of the public utility system and consistent with the interests of investors and consumers.[4] Thus, the SEC, in noting that OPCO's investment in SOCCO was intended "to assure a reliable supply of coal" for OPCO's generating facilities,[5] made the judgment that any dangers inherent in the arrangement were outweighed by the prospect of improved dependability of supply and potential economies of operation.

At the same time, the SEC recognized that undertaking a captive coal operation can involve a significant capital outlay and that the feasibility of a start-up operation can be dependent upon a consistent pricing stand-

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[4] *See* Sections 9, 10 and 11 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79i, 79j, and 79k.

[5] *See, e.g.*, HCAR No. 17383; HCAR No. 20515.

ard. While SEC rules governing the prices paid by an affiliated company for seller-produced goods (such as the SOCCO coal) can be read to mandate a lower-of-cost-or-market standard,[6] the SEC staff has long recognized that this standard would have the effect of prohibiting captive coal operations by making such investments improvident on their face.[7] This would certainly have been true with respect to the inactive mines OPCO sought to operate.

Accordingly, the four SEC orders should be construed to exempt OPCO from the self-executing standards of the SEC rules governing seller-produced goods and instead to establish a cost-based pricing standard consistent with the provisions of Section 13(b) of the Public Utility Holding Company Act, 15 U.S.C. 79m(b). The orders should be construed to obligate OPCO to pay a cost-based price and only a cost-based price since, were OPCO to do otherwise, it would undermine the very reason that the SEC authorized the acquisition of SOCCO—that is, to ensure a stable and secure supply of coal—and would be detrimental to the interests of holding company shareholders by rendering the return on OPCO's investment in SOCCO uncertain at best.[8]

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[6] *See* SEC Rules 90(d)(2) and 92(b), 17 C.F.R. 250.90(d)(2), and 250.92(b).

[7] October 27, 1978 Comments of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206 at 18 n.15.

[8] In this regard, the SEC disagrees with the argument on pages 16-17 of the intervenors' brief that the SEC could "set forth or approve any sort of section 13(b) strict cost flow through requirement" only by making a finding, as required under Rule 88(b) of the SEC rules and pursuant to a declaration filed on Form U-13-1, that SOCCO was so organized and conducted or to be conducted, as to meet the requirements of Section 13(b). Rule 88(b), 17 C.F.R. 250.88(b), however, concerns subsidiary companies that, under Rule 87(a)(2), 17 C.F.R. 250.87(a)(2), may engage in service, sales or construction contracts involving associate companies because they

Thus, the SEC disagrees with the interpretation FERC places on the SEC orders in this case. The SEC does not agree that its orders "only purport to establish a ceiling for the price SOCCO can charge Ohio Power" (Br. 15; *see also* Br. 21, 27) or that its orders are not "directive[s] * * * to conform to a specific price" (Br. 26) or that "[n]othing in the express terms of the orders could * * * have reasonably led Ohio Power to conclude that it could not pay less for coal than SOCCO's cost * * *" (Br. 27). Instead, the SEC believes that the orders establish cost as both a floor and a ceiling.[9]

CONCLUSION

For the foregoing reasons, the SEC views its orders as obligating OPCO to pay cost for the SOCCO coal.

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have been found to satisfy the requirements of Section 13(b). The SOCCO coal transaction need not involve such a finding, since under Rule 87(b)(6), 17 C.F.R. 250.87(b)(6), any subsidiary, whether or not it is a company specified in Rule 87(a)(2), can engage in a transaction involving a sale of goods produced by the seller. Accordingly, the requirements of Rule 88(b) are irrelevant here.

[9] Of course, orders such as these can be modified or rescinded by the SEC if circumstances warrant.